Sanuar Kamarudin bin Ahmad v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor

HIGH COURT (KOTA BHARU) — CRIMINAL APPLICATION NO 44–10–1996
NIK HASHIM JC
22 MAY 1996

Criminal Procedure *— Habeas corpus — Detention of drug addict — Non-compliance with provisions of Drug Dependants (Treatment and Rehabilitation) Act 1983 — Whether failure to consider rehabilitation officer's report fatal to order of detention — Drug Dependants (Treatment and Rehabilitation) Act 1983 s 6(1)(a), (3), (4) & (5)*

This was an application by Sanuar Kamarudin bin Ahmad ('the applicant') under s 365 of the Criminal Procedure Code (FMS Cap 6) for a writ of habeas corpus ad subjiciendum. The applicant was ordered by the magistrate to be detained to undergo treatment and rehabilitation for two years and thereafter to undergo after-care supervision of a rehabilitation officer for another period of two years under s 6(1)(a) of the Drugs Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'). The applicant contended that the police, medical and and rehabilitation officer's reports were not marked as exhibits and as such, there was no evidence before the court to support the magistrate's order. The federal counsel submitted that the failure to mark the reports was not fatal to the order.

Held, allowing the application and releasing the applicant:

(1) The provision of s 6 of the Act is penal in nature, affecting the freedom of the individual. This must be well-appreciated by the magistrate before exercising his summary powers under the Act. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is to be released forthwith (see p 4D–G); *Ang Gin Lee v PP* [1991] 1 MLJ 498 and *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245 followed.

(2) Before an order of detention for the treatment and rehabilitation under s 6(1)(a) of the Act can be lawfully made on a drug dependant, several conditions precedent must be strictly complied with. These conditions precedent are namely, that the arrested drug dependant shall be informed as soon as it may be of the grounds of his arrest; he must be certified by a government medical officer or a registered medical practitioner to be a drug dependant; he must be given the opportunity of making representations and not merely pleas and appeals; the magistrate must consider a report by a rehabilitation officer and a copy of the same must be supplied, read out and explained to the person to be detained; the magistrate must take into account the circumstances of the case, the character, antecedents, age, health,

education, employment, family and other circumstances of the person to be detained and the magistrate must keep a record of the proceedings and the fact that all the conditions precedent in sub-ss (1), (3), (4) and (5) of s 6 of the Act have been complied with (see pp 4H–5D); *Re Haji Sazali* [1992] 2 MLJ 864, *Hoo Thian Siong v PP* [1988] 2 MLJ 401 and *Re Roshidi bin Mohamed* [1988] 2 MLJ 193 followed.

(3) There was, nowhere in the record, anything which showed that the magistrate had considered the rehabilitation officer's report before he made the order. Therefore, the magistrate could not be said to have complied with the mandatory provision of s 6(3) of the Act. Such non-compliance of s 6(3) is fatal to the continued detention of the applicant for the purposes of treatment and rehabilitation under s 6(1)(a) of the Act. The order was bad and the applicant's detention was unlawful for not being in compliance with the law (see p 6E–G).

[Bahasa Malaysia summary

Ini adalah permohonan oleh Sanuar Kamarudin bin Ahmad ('pemohon') di bawah s 365 Kanun Acara Jenayah (NMB Bab 6) untuk suatu writ habeas corpus ad subjiciendum. Pemohon telah diarahkan oleh majistret supaya ditahan untuk menjalani rawatan dan pemulihan selama dua tahun dan selepas itu untuk menjalani pengawasan jagaan susul oleh pegawai pemulihan untuk tempoh selama dua tahun lagi di bawah s 6(1)(a) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 ('Akta itu'). Pemohon menegaskan bahawa laporan-laporan polis, perubatan dan pegawai pemulihan telah tidak ditandakan sebagai ekshibit dan oleh itu, tidak terdapat keterangan di hadapan mahkamah untuk menyokong perintah majistret. Peguam persekutuan telah berhujah bahawa kegagalan untuk menandakan laporan-laporan itu tidak menyebabkan perintah itu terbatal.

Diputuskan, membenarkan permohonan itu dan membebaskan pemohon:

(1) Peruntukan s 6 Akta itu adalah bersifat penal, yang membawa kesan ke atas kebebasan seseorang individu. Ini seharusnya disedari dengan sewajarnya oleh majistret sebelum beliau menjalankan kuasa terusnya di bawah Akta itu. Di mana penahanan tidak boleh diputuskan sebagai telah mematuhi prosedur yang ditetapkan oleh undang-undang, maka penahanan itu adalah salah dan orang yang ditahan hendaklah dibebaskan serta-merta (lihat ms 4D–G); *Ang Gin Lee v PP* [1991] 1 MLJ 498 dan *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245 diikut.

(2) Sebelum satu perintah penahanan untuk rawatan serta pemulihan dibawah s 6(1)(a) Akta itu boleh dibuat secara sah ke atas seorang penagih dadah, beberapa syarat terdahulu mestilah

dipatuhi dengan ketat. Syarat-syarat terdahulu ini adalah khususnya, bahawa penagih dadah yang ditahan hendaklah diberitahu alasan-alasan penahanannya secepat yang mungkin; beliau hendaklah disahkan oleh seorang pegawai perubatan kerajaan atau pengamal perubatan berdaftar sebagai seorang penagih dadah; beliau mestilah diberi peluang untuk membuat representasi dan tidak hanya setakat membuat permohonan atau rayuan; majistret seharusnya mempertimbangkan laporan pegawai pemulihan dan satu salinan yang sama mestilah diberikan, dibaca dan diterangkan kepada orang yang hendak ditahan; majistret mesti mengambil kira hal keadaan kes, perwatakan, sejarah hidup, umur, kesihatan, pendidikan, pekerjaan, keluarga dan hal keadaan lain orang yang hendak ditahan dan majistret mesti menyimpan rekod prosiding itu serta fakta bahawa kesemua syarat-syarat terdahulu dalam sub-ss (1), (3), (4) dan (5) dalam s 6 Akta itu telah dipatuhi (lihat ms 4H–5D); *Re Haji Sazali* [1992] 2 MLJ 864; *Hoo Thian Siong v PP* [1988] 2 MLJ 401 dan *Re Roshidi bin Mohamed* [1988] 2 MLJ 193 diikut.

(3) Tidak terdapat, mana-mana dalam rekod, apa-apa yang menunjukkan bahawa majistret telah mempertimbangkan laporan pegawai pemulihan sebelum beliau membuat perintah itu. Oleh itu, majistret itu tidak boleh dikatakan telah mematuhi peruntukan mandatori s 6(3) Akta itu. Kegagalan untuk mematuhi s 6(3) sedemikian adalah membawa padah kepada penerusan penahanan pemohon untuk tujuan rawatan dan pemulihan di bawah s 6(1)(a) Akta itu. Perintah itu adalah salah dan penahanan pemohon adalah tidak sah kerana tidak mematuhi undang-undang (lihat ms 6E–G).]

Notes

For cases on the writ of habeas corpus in relation to the detention of drug addicts, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1361–1363.

Cases referred to

Ang Gin Lee v PP [1991] 1 MLJ 498
Datuk James Wong Kim Min, Re [1976] 2 MLJ 245
Haji Sazali, Re [1992] 2 MLJ 864
Hoo Thian Siong v PP [1988] 2 MLJ 401
Roshidi bin Mohamed, Re [1988] 2 MLJ 193

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 365
Drugs Dependants (Treatment and Rehabilitation) Act 1983 s 6(1)(a), (3), (4), (5)
Federal Constitution art 5(3)

Dato' Hj Sukri bin Hj Mohamed (*Wan Harun Sukri & Nordin*) for the applicant. A

Mohd Abazafree bin Mohd Abas (Federal Counsel) for the respondents.

Cur Adv Vult

B

Nik Hashim JC: This is an application under s 365 of the Criminal Procedure Code (FMS Cap 6)for a writ of habeas corpus ad subjiciendum at the instance of Sanuar Kamarudin bin Ahmad. The learned magistrate had ordered him to be detained to undergo treatment and rehabilitation at Pusat Pemulihan Serenti, Jeli, Kelantan for two years and thereafter to undergo after-care supervision of a rehabilitation officer for another period C of two years under s 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act').

The importance of s 6 needs no emphasis. Its provision is penal in nature, affecting the freedom of an individual. It is therefore advised that a magistrate dealing with such a case appreciate the provision well before D exercising his summary powers under the Act. Hashim Yeop A Sani CJ (Malaya), speaking for the Supreme Court in *Ang Gin Lee v PP* [1991] 1 MLJ 498, observed at p 501:

> We appreciate that the provision of s 6 of the Act, is penal in character in the sense that a person can be ordered to reside in a rehabilitation centre for E two years to undergo treatment probably against his will. At the same time we also appreciate that it is a provision designed for the rehabilitation of drug dependants. It is a social legislation of sort. But we must not forget however that the same legislation confers summary powers on the magistrate and can seriously affect the freedom of an individual.

Lee Hun Hoe CJ (Borneo) in *Re Datuk James Wong Kim Min* [1976] 2 F MLJ 245 (FC) at p 251 said:

> The material provisions of the law authorizing detention without trial must be strictly construed ... Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. G

His Lordship was dealing with detention under the Preservation of Public Security Ordinance 1962 of Sarawak. In this case although the detention is under the Act, in my view, the same principle applies.

What is clear from the authorities is that, the order of detention for the treatment and rehabilitation under s 6(1)(a) cannot be lawfully made H on a drug dependant unless the following conditions precedent are strictly complied with:

(1) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest (see art 5(3) of the Federal Constitution);

(2) The person to be detained is certified by a government medical officer or a registered medical practitioner to be a drug dependant (see s 6(1) of the Act); I

(3) The person to be detained must be given the opportunity of making representations and not merely appeals and pleas (see s 6(1) of the Act; *Hoo Thian Siong v PP* [1988] 2 MLJ 401);

(4) The magistrate must consider a report by a rehabilitation officer—

(a) a copy of such report must be supplied to the person to be detained; and

(b) such report must be read out and explained to him (see s 6(3) of the Act; *Re Haji Sazali* [1992] 2 MLJ 864);

(5) In making the order, the magistrate must have regard to the circumstances of the case, and the character, antecedents, age, health, education, employment, family and other circumstances of the person to be detained (see s 6(4) of the Act; *Re Haji Sazali* [1992] 2 MLJ 864);

(6) The magistrate must keep a record of the proceedings and the fact that the conditions precedent in sub-ss (1), (3), (4) and (5) of s 6 are complied with (see *Re Roshidi bin Mohamed* [1988] 2 MLJ 193).

In this case, the learned magistrate had used pre-prepared notes in the proceeding. What he did in the course of the proceeding was that he filled in the blanks with the relevant dates, the names of the drug and the officers, wrote down their recommendations, and deleted whatever was inapplicable.

Dato' Hj Sukri bin Hj Mohamed, learned counsel for the applicant, argued that the police, medical and rehabilitation officer's reports, even though they were attached to the record, were not marked as exhibits, and as such there was no evidence before the court to support the order made by the learned magistrate. Encik Mohd Abazafree bin Mohd Abas, learned federal counsel, however, submitted that the failure to mark the reports as exhibits is not fatal and does not entitle the applicant to be released.

At a glance, I find that the police report of arrest, the medical and the rehabilitation officer's reports are in existence and in fact, they are attached to the record. In the notes of proceedings, the police and medical reports were marked as exhs P1 and P2 respectively, whilst exh P3 referred to the '*laporan* P/JKKN'. The only flaw is that the exhibit indicators ie, 'P1', 'P2' and 'P3' were not shown on the respective reports. I would agree with the submission of the learned federal counsel if such failure was just an oversight on the part of the magistrate to mark the exhibits and dismiss the application as being without merit. But on closer examination of the records, I find to my great surprise that there is no correlation or nexus between the report of P/JKKN which was marked as exh P3 in the notes of proceedings with the report of the rehabilitation officer which was not marked as an exhibit but was attached to the record. There was no evidence by affidavit or otherwise to connect the two. I tried to read '*laporan* P/JKKN' to mean the rehabilitation officer's report or *lapuran pegawai pemulihan* in Malay. But I cannot, because '*laporan* P/JKKN' means '*laporan Pegawai Jawatankuasa Keselamatan Negeri*', whereas the rehabilitation officer's report means *laporan pegawai pemulihan*. How the

abbreviation 'P/JKKN' was referred to in the record really puzzles the court. Perhaps, the *pegawai pemulihan* is also a *Pegawai* JKKN in the Department of *Jawatankuasa Keselamatan Negeri*. However, there is no evidence to that effect. So, in the absence of any explanation, the court cannot say with confidence whether the P/JKKN's report marked as P3 in the notes of proceedings and taken into consideration by the magistrate means the report of the rehabilitation officer.

Here is what was stated at the end of the proceeding notes:

> Mahkamah:
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> Setelah meneliti laporan doktor dan *laporan P/JKKN* serta setelah mengambil kira hal keadaan kes, watak, riwayat, umur, kesihatan, pelajaran, pekerjaan, keluarga dan hal keadaan lain penama sendiri sebagai mematuhi kehendak peruntukan s 6(4) APD (R & P) 1983, mahkamah dengan ini memerintahkan supaya penama ini dihantar ke Pusat Serenti Jeli, Kelantan selama dua tahun mengikut peruntukan s 6(1)(a) APD (R & P) 1983 dan selepas itu diletakkan di bawah jagaan lanjutan pegawai pemulihan selama tempoh dua tahun lagi. [emphasis added]
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> tt M Bakri bin Abd Majid
> Majistret

There is, nowhere in the record, anything which shows that the learned magistrate had ever mentioned and considered the rehabilitation officer's report before he made the order. The law requires that the magistrate considers the rehabilitation officer's report and not the *laporan* P/JKKN. Apart from that, he had complied with the other conditions. However in this case, there is no evidence to indicate that the *laporan* P/JKKN is the rehabilitation officer's report. That being so, in the absence of such evidence, the learned magistrate cannot be said to have complied with the mandatory provision of s 6(3) of the Act, which requires that the magistrate shall consider a report by a rehabilitation officer on the applicant. Failure to comply with the strict provision of s 6(3), to my mind, is fatal to the continued detention of the applicant for the purposes of treatment and rehabilitation under s 6(1)(a), and as such, the order is bad. The detention is unlawful for not being in compliance with the law. I accordingly, allow the writ of habeas corpus and order that the applicant, Sanuar Kamarudin bin Ahmad, be released forthwith.

Application allowed.

Reported by Hanim Kamaruddin